IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1501

JAMES JEFFERSON McLAIN, ET AL.,
Petitioners,

versus

REAL ESTATE BOARD OF
NEW ORLEANS, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The district court's dismissal of petitioners' complaint (Pet. 17a-23a)[1] is reported at 432 F. Supp. 982.

1 References (Pet. . . . a) are to Petitioners' Appendix. Reference to Petitioners' Certiorari Petition are indicated as (Pet. . . .). "App. . . ." refers to the Appendix filed with the Court of Appeals.

The Fifth Circuit's affirmance (Pet. 24a-43a) is reported at 583 F.2d 1315.

QUESTION PRESENTED

Whether this Court should grant certiorari to review a judgment dismissing petitioners' Sherman Act complaint under F.R. Civ. P. 12(b)(1) for petitioners' admitted (Pet. 7) failure to prove, after an evidentiary hearing, that real estate brokerage services are an integral part of any interstate commerce related to residential real estate transactions in Greater New Orleans.

COUNTERSTATEMENT OF THE CASE

Petitioners, an uncertified class of purchasers and sellers of residential real estate, filed a complaint on October 30, 1975 charging respondents, the Real Estate Board of New Orleans and various of its members, with fixing real estate sales commission rates in violation of Section 1 of the Sherman Act. (Pet. 2a). Significantly, in the 19 months between filing and dismissal, petitioners produced not one shred of evidence to support their broad, conclusory price-fixing allegations.

Petitioners alleged that respondents' real estate brokerage activities are in or affecting interstate commerce because many of respondents' clients are persons moving into Greater New Orleans from out-of-

state, and because respondents assist clients in securing real estate financing and insurance that is obtained from out-of-state sources. (Pet. 8a-9a).

Respondents moved to dismiss, asserting that petitioners' interstate commerce allegations were without basis in fact. In support, respondents submitted the still uncontradicted sworn affidavits of two Real Estate Board officers testifying that:

> (1) there is no requirement, legal or otherwise, that real estate purchases or sales be made with the assistance of a real estate broker;
>
> (2) real estate brokers are not instrumental in securing real estate financing or title insurance;
>
> (3) a real estate broker's primary function, for which he or she is licensed to operate solely within the State of Louisiana, is to counsel prospective purchasers and sellers of real estate located in the State of Louisiana with a view toward concluding mutually satisfactory agreements to purchase or sell; and
>
> (4) the brokers' function is complete when he or she procures for the client another person qualified either to purchase or sell the property in question.

Extensive memoranda were submitted and oral argument had on respondents' Motion to Dismiss,

following which the district judge called a pre-trial conference on September 3, 1976 at which he expressed the opinion that, in order to satisfy the subject matter jurisdiction requirement, petitioners would have to meet the test of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 772, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) and that further discovery was needed on this issue.[2]

A further pre-trial conference was held on October 13, 1976, at which time discovery with respect to the jurisdictional issue was ordered to be completed no later than December 31, 1976.[3]

During the four months of discovery that ensued after the September pre-trial conference, petitioners produced some evidence that certain real estate mortgage funds and title insurance policies are secured or guaranteed by out-of-state sources. None of

2 The minute entry on this conference reads, in pertinent part: "The Court advised counsel that it appeared plaintiffs may satisfy said jurisdictional requirement only by bringing the facts of this case within the parameters of the Supreme Court's holding in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572, 1975. It is recognized, however, that further discovery is needed on the issue of *Goldfarb's* applicability *sub judice*. More specifically, such discovery should determine whether, in the first place, there is the requisite interdependence between the brokerage activity of defendant and the financing and/or insuring of real estate transactions in the New Orleans area and, secondly, whether there is a substantial involvement of interstate commerce in such real estate transactions *via* the financing and/or insurance aspects thereof." App. 247a-8a.

3 App. 262a. On application of the plaintiffs, this cut-off date for discovery was subsequently extended to January 14, 1977, App. 272a-3a.

petitioners' evidence, however, refuted that of respondents, which showed that real estate brokers play little or no role in the financing or insuring of real estate transactions.

Presented with this admitted failure by petitioners (Pet. 7) to prove that real estate brokerage services are an integral part of any interstate commerce, the district court ultimately granted respondents' Motion to Dismiss and the Fifth Circuit affirmed, under F.R. Civ. P. 12(b)(1).

REASONS FOR DENYING THE WRIT

I.

Summary of Argument

Contrary to petitioners' arguments, there is no conflict between the decisions below and any other decisions of this Court. Importantly, petitioners apparently agree. Notwithstanding the bold title of Part I of the Petition, (Pet. 7-15), i.e., "The Decision Below Conflicts With This Court's Decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975)," petitioners ultimately concede that (1) *Goldfarb* actually applied "conventional" interstate commerce analysis to the facts of that case (Pet. 10); (2) the courts below applied the "exact same [*Goldfarb*] analysis to the relation between [respondents'] brokerage services and interstate commerce in land transactions" (Pet. 10); and that (3) the error of the courts below was not that their

decisions conflicted with *Goldfarb's* analysis, but rather that they followed *Goldfarb* too carefully:

> Petitioners submit that the courts below erred in assuming that the exact analysis by which this Court found jurisdiction in *Goldfarb* is the only manner in which jurisdiction can be found. (Pet. 15).

Petitioners' real complaint is that the *result* below conflicts with the *Goldfarb result*, notwithstanding the fact that the *results* here and in *Goldfarb* were reached via the same analytical route. In truth, petitioners seek to have this Court review and expand its *Goldfarb* holding.

Respondents' confusion over "conflicting decisions" continues in Part II of the Petition (Pet. 15-17), with the broad claim that there are "numerous conflicting decisions in the trial and appellate courts" on the issue decided by the Fifth Circuit. Analysis demonstrates that (1) the only allegedly conflicting *appellate* decision, *Sapp* v. *Jacobs*, 547 F.2d 1170 (7th Cir. 1977), is an *unreported* decision which, under the Seventh Circuit's own Rule 35, "may not be cited in any other federal court within the circuit for any purpose except *res judicata*, collateral estoppel, or law of the case"; (2) nowhere do petitioners cite *Diversified Brokerage Service, Inc.* v. *Greater Des Moines Bd. of Realtors*, 521 F.2d 1343 (8th Cir. 1975), which decision agrees with the decisions below, and which (by virtue of the non-precedential status of the Seventh Circuit's decision in *Sapp* v. *Jacobs*,)

makes the decisions at the circuit court level (Fifth, Sixth, Eighth and Tenth) in complete accord; (3) all but one of petitioners' allegedly conflicting trial court decisions are readily distinguishable; and (4) out of apparent desperation, petitioners claim that *United States* v. *Long Island Bd. of Realtors*, 1972 Trade Cases ¶ 74,068 (E.D.N.Y. 1972) is a "conflicting" case, whereas it is an agreed consent decree, not a litigated case, with no precedential value.

Finally, in accord with *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1935), and the decisions interpreting F.R. Civ. P. 12(b)(1), petitioners, although given ample opportunity, did not sustain their burden of proof on the subject matter jurisdiction issue, and failed to put facts in the record at the trial level to support a finding of an effect on interstate commerce. In this and several other recent cases, the Fifth Circuit has exercised its inherent power of control over its district courts by approving the practice of separating contested jurisdictional issues from the merits of an antitrust case. *See*, e.g., *Rosemound Sand & Gravel Co.* v. *Lambert Sand & Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972). This approach provides a vehicle to reduce the burgeoning case load of the nation's second largest circuit, and enables antitrust defendants to test jurisdiction and avoid the substantial financial burden of defending on the merits where subject matter jurisdiction is absent.

II.

The Decisions Below Do Not Conflict With Any Decision Of This Court

This Court answered the question presented here over thirty years ago in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). There, the Government charged that a taxicab holding company violated Sections 1 and 2 of the Sherman Act by monopolizing (1) taxicab sales to operating companies in Chicago, Pittsburgh, New York and Minneapolis, and (2) the operation of intracity taxi service in Chicago. Defendants argued that the complaint did not allege a restraint on interstate commerce, and the district court granted defendants' motion to dismiss. On direct appeal, this Court reversed and remanded.

This Court first considered whether the sale of taxicab vehicles was in interstate commerce. Since defendants' factory was in Michigan, and their customers were in Illinois, Pennsylvania, New York and Minnesota, such sales were held to be plainly interstate.[4]

4 332 U.S. at 225. Once it determined that the alleged restraint acted directly upon interstate commerce, this Court made short shrift of defendants' contentions that the quantity of interstate commerce restrained was small, or that the restraint was unimportant when compared to the total interstate commerce in the United States. This Court declared that "The Sherman Act is concerned with more than the large, nationwide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." 332 U.S. at 226.

This Court then turned to the interstate commerce effects of defendants' intracity taxicab service — the object of the second count of the Government's complaint. Two separate aspects of defendants' service were analyzed: (1) defendants' contracts with railroads to transport interstate passengers between connecting trains located at different Chicago railroad stations; and (2) the defendants' general intracity taxi service. This Court held that the former service affected interstate commerce, but the latter did not.

Examining defendants' service between railroad stations, this Court found that railroad passengers remained in interstate commerce while they moved between stations, and concluded that

> [The taxicab ride] must be viewed in its relation to the entire journey. So viewed, it is an *integral* step in the interstate movement. 332 U.S. at 229.

The opposite conclusion was reached when defendants' general intracity taxi service was analyzed. The Government argued that the defendants' general service affected interstate commerce because many travelers began or ended interstate journeys by taking taxis to or from railroad stations. This Court held, however, that this service was not subject to the Sherman Act because its effect on interstate commerce was wholly incidental. This Court distinguished the general intracity service from that between railroad stations as follows:

> We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation "between any two points within the corporate limits of the City." None of them serves only railroad passengers, all of them being required to serve "every person" within the limits of Chicago. They have no contractual or other arrangements with the interstate railroad. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental. 332 U.S. at 230-31.

In sum, the teaching of *Yellow Cab* is that Sherman Act jurisdiction exists only if an alleged restraint acts *directly upon* interstate commerce, or is an *integral and inseparable* part of another transaction that involves substantial interstate commerce. *Yellow Cab* likewise holds that wholly local activity that is only *incidentally or fortuitously* related to interstate commerce is not subject to the Sherman Act.[5]

5 This Court and others have consistently followed these principles over the last three decades. *See, e.g., Hospital Bldg. Co.* v. *Trustees of Rex Hospital*, 475 U.S. 738 (1976) (intrastate hospital service affected interstate commerce because services generated substantial purchases of out-of-state medical supplies); *Burke* v. *Ford*, 389 U.S. 320 (1967) (interstate liquor wholesaler conspiracy affected interstate commerce because conspiracy directly affected interstate shipment of liquor); *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) (intrastate sugar beet production affected interstate commerce because sugar beets were essential raw material of sugar sold in interstate commerce); *Lieberthal* v. *North Country Lanes*, 332 F.2d 269 (2nd Cir. 1964) (conspiracy to restrain bowling alley competition did not affect interstate commerce simply because bowling alleys served out-of-state customers); *Page* v. *Work*, 290 F.2d 323 (9th Cir.), *cert. denied* 368 U.S. 875 (1961) ("test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.")

This Court applied *Yellow Cab* in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the case petitioners misread to support their Petition. In *Goldfarb* a class of residential real estate purchasers charged that minimum fee schedules promulgated by state and county bar associations for real estate title examinations violated Section 1 of the Sherman Act. The defendant bar associations contended, among other things, that title examinations did not affect interstate commerce for purposes of the Sherman Act. The Fourth Circuit reversed the district court's finding in favor of plaintiffs,[6] and held that title examinations only "incidentally" affected interstate commerce.[7]

This Court reversed, noting first that the transactions at issue involved substantial interstate commerce because (1) a significant amount of mortgage money came from out-of-state lenders, and (2) significant amounts of real estate loans were guaranteed by federal agencies headquartered in Washington, D.C.

6 355 F. Supp. 491 (E.D. Va. 1973).

7 497 F.2d 1, 15-19 (4th Cir. 1974).

421 U.S. at 783. This Court then found that the minimum attorney fee schedules were an *integral and inseparable* part of this interstate commerce because real estate lenders required, as a condition of the loan, that property titles be examined; under Virginia law, only attorneys can examine real estate titles.[8]

In short, this Court held that attorney title examinations had exactly the same effect on interstate commerce as the taxi service between railroad stations in *Yellow Cab*. At the same time, however, this Court reaffirmed *Yellow Cab's* holding that essentially local activity only incidentally affecting interstate commerce is not subject to the Sherman Act. As *Goldfarb* recognized, "Of course, there may be legal services that involve interstate commerce in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act." 421 U.S. at 785.

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8 As the Court reasoned:

> Thus in this class action the transactions which create the need for the particular legal service in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower. In financing realty purchases lenders require, "as a condition of making the loan, that the title to the property involved be examined . . . ." Thus a title examination is an *integral part* of an interstate transaction . . . . (emphasis supplied) 421 U.S. at 783-84.

What *Goldfarb* plainly does not hold is what petitioners contend: that *any* product or service that relates to real estate is subject to the Sherman Act. Were this the holding of *Goldfarb*, it would not only fly in the face of over thirty years of antitrust jurisprudence, but also two hundred years of federalism. *See National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Parker* v. *Brown*, 317 U.S. 341 (1943).

Petitioners' misunderstanding of *Goldfarb* is apparent from close analysis of the Petition. Not surprisingly, petitioners characterize *Goldfarb* as the "first decision" marking the "boundary of an entirely new area of antitrust jurisdiction to wit: residential real estate." (Pet. 8). Two pages later, however, petitioners concede that *Goldfarb* actually applied "conventional" interstate commerce analysis to the facts of that case. (Pet. 10). But in their next breath, petitioners attack the courts below for following *stare decisis*, and applying the "exact same analysis to the relation between brokerage services and interstate commerce in land transactions." (*Id.*). Petitioners finally conclude their *Goldfarb* analysis by saying what they really mean: the error of the courts below is not that they reached a conclusion that conflicts with *Goldfarb*, but that they followed *Goldfarb* exactly:

> Petitioners submit that the courts below erred in assuming that the exact analysis by which this Court found jurisdiction in *Goldfarb* is the only manner in which jurisdiction can be found. (Pet. 15).

On the contrary, the district court and the Fifth Circuit properly applied *Goldfarb* and refused petitioners' invitation to stand the federal system on its head. Indeed, the Fifth Circuit was moved to make the following comment on the constitutional consequences of petitioners' *Goldfarb* analysis:

> In conclusion, we speak to the applicants' argument that the full realization of congressional policies mandates expansive judicial construction of the commerce clause .... Juxtaposed against this [argument], however, is the growing spirit of federalism manifested at all levels of judicial and legislative decision-making. This momentum is fueled by the realization that state processes are available to combat the full gamut of wrongdoing, often including alleged restraints of trade. (583 F.2d at 1324, Pet. 41a)

III.

Petitioners' Complaint Was Properly Dismissed Under F.R. Civ. P. 12(b)(1) For Failure To Prove Subject Matter Jurisdiction

The Fifth Circuit affirmed the dismissal of petitioners' complaint for lack of subject matter jurisdiction under F.R. Civ. P. 12(b)(1). Unlike a F.R. Civ. P. 12(b)(6) motion for failure to state a claim, a Rule 12(b)(1) motion does not presume that plaintiff's pleadings are true, but rather challenges the adequacy

of the allegations that purport to confer jurisdiction on the court.[9] If a Rule 12(b)(1) attack is made, the burden is on the plaintiff to prove that the requisite jurisdictional facts exist. *See McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1935); *Rosemound Sand & Gravel Co.* v. *Lambert Sand & Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972); 5 C. Wright & A. Miller, Federal Practice and Procedure §1363.

Respondents put petitioners' interstate commerce allegations squarely in issue by moving to dismiss petitioners' complaint because the challenged activity lacked the necessary interstate commerce nexus. After four months of discovery, all petitioners were able to show is that some amount of New Orleans real estate financing money and loan guarantees may come from out-of-state sources, and that some New Orleans real estate titles may be insured by out-of-state agencies. Petitioners produced not one shred of evidence linking real estate brokerage services to this allegedly substantial amount of interstate commerce. Indeed, petitioners

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9 The Fifth Circuit described the nature of a Rule 12(b)(1) attack as follows:

> Thus, we view the proceedings below as what the Third Circuit might call a 12(b)(1) "factual attack." *Mortensen* v. *First Federal Sav. & Loan Ass'n.*, 549 F.2d 884, 890-891 (3d Cir. 1977). Such an evaluation challenges more than the sufficiency of the allegations: it questions the existence of the underlying jurisdictional facts. "In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist. *Id.*, at 891. (Pet. 25a).

flatly concede here that they "failed to establish that the challenged activity (brokerage service) is an 'essential integral part of the transaction inseparable from its interstate aspects.' " (Pet. 7).

Petitioners' concession is correct, since the testimony of New Orleans real estate brokers demonstrated that real estate brokers have little, if any, role in real estate financing and title insurance in New Orleans. From this uncontroverted evidence, the district court drew the following "inescapable" conclusions:

> Those real estate financing officials who were deposed consistently testified that, while brokers customarily contact mortgage companies to solicit financing information on behalf of clients and on occasion even transport clients to the company offices, *the actual financing process involves only the lender and borrower and the brokerage service is in no way an integral aspect thereof* . . . . With regard to title insurance, it also appears through deposition testimony that the actual procurement process takes place between the insurer and lending institution/purchaser, the only contract between an insurer and broker being that the former does provide information concerning its services to various realtors . . . . *The inescapable conclusion to be drawn from the evidence is that the participation of the broker in these*

> *(presumably interstate) phases of the real estate transaction is an incidental rather than indispensable occurrence in the transactional chain of events.* (emphasis supplied) (Pet. 21a).

Plainly, petitioners were afforded a full opportunity to prove what this Court held in *Goldfarb* is required before Sherman Act jurisdiction will attach: that real estate brokerage services are an integral and inseparable part of substantial interstate commerce involved in New Orleans residential real estate transactions. This petitioners admittedly failed to do (Pet. 7). When respondents proved to the contrary that real estate brokerage services are, at best, wholly incidental to any interstate commerce, the courts below had no choice but to follow this Court's holdings in *Yellow Cab* and *Goldfarb* and dismiss petitioners' complaint under Rule 12(b)(1).

IV.

There Is No Conflict Among The Lower Courts

Circuit court decisions addressing facts similar to those presented here uniformly hold that real estate brokerage services are not subject to the Sherman Act.

The Sixth Circuit came to this conclusion nine years ago in *Marston* v. *Ann Arbor Property Mgt. Ass'n.*, 422 F.2d 836 (6th Cir. 1970), *aff'g*, 302 F. Supp. 1276 (E.D. Mich. 1969). In that case, plaintiffs charged that an apartment

owners association conspired to fix rental rates, and that interstate commerce was affected because many of them were from out-of-state. The district court dismissed plaintiff's complaint for lack of subject matter jurisdiction, and the Sixth Circuit affirmed *per curiam*. *See, also, Cotillion Club Inc.* v. *Detroit Real Estate Bd.*, 303 F. Supp. 850 (E.D. Mich. 1964).

The Eighth Circuit reached a similar result in *Diversified Brokerage Service, Inc.* v. *Greater Des Moines Bd. of Realtors*, 521 F.2d 1343 (8th Cir. 1975), which petitioners fail to even cite. There, plaintiff charged that his exclusion from the defendant Board violated the Sherman Act. The plaintiff's sole basis for interstate commerce jurisdiction was that some of the defendant Board's members served clients who had moved from out-of-state. Granting defendant's motion to dismiss, the court made short shrift of this contention, citing *Yellow Cab:*

> Following the rationale of *Yellow Cab*, the cases uniformly hold that the mere movement of individuals from one state to another does not transform those services into interstate services within the meaning of the Sherman Act. [citations omitted]. 521 F.2d at 1346.

Two recent cases decided by the Tenth Circuit are in accord. In *Income Realty & Mtg., Inc.* v. *Denver Bd. of Realtors*, 578 F.2d 1326 (10th Cir. 1978) and *Bryan* v. *Stillwater Bd. of Realtors*, 578 F.2d 1319 (10th Cir. 1977) that court held

that real estate brokerage services do not affect interstate commerce, affirmed dismissals of Sherman Act complaints in both cases.

Not only do the Sixth, Eighth and Tenth Circuits agree with the Fifth that real estate brokerage services do not affect interstate commerce, but also they agree that antitrust jurisdictional issues may be tested separately from the issues on the merits. *Rosemound Sand & Gravel* v. *Lambert Sand & Gravel*, 469 F.2d 416 (5th Cir. 1972); *see also McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1935). This approach provides a vehicle to reduce the burgeoning case load of district courts and enables antitrust defendants to test jurisdiction and avoid the tremendous financial burden of defending on the merits where jurisdiction is absent.

Faced with this uniformity among the circuits, petitioners are reduced in their search for a conflict among lower courts to an unpublished order of the Seventh Circuit, an antitrust consent decree, and assorted procedurally and factually distinguishable district court decisions. Petitioners must know that these cases in fact present no conflict because, rather than analyze these cases, petitioners simply list them according to their result. An examination of these cases quickly reveals that they are totally distinguishable from the instant case, with one exception.

Petitioners concede (Pet. 17), as they must, that a conflict among appellate courts can only be based upon

an unpublished Seventh Circuit reversal of a district court decision rendered on a wholly different set of facts. *Sapp* v. *Jacobs*, 408 F. Supp. 119 (S.D. Ill.), *rev'd* 547 F.2d 1170 (7th Cir. 1976), *cert. denied* 431 U.S. 968 (1977). Under the Seventh Circuit's Rule 35, an unpublished order may not be cited in any other federal court within the circuit for any purpose except *res judicata*, collateral estoppel, or law of the case. Thus even the Seventh Circuit views its action in *Sapp* v. *Jacobs* as being without any precedential value. An analysis of the district court's opinion shows why the *Sapp* reversal does not conflict with this case.

In *Sapp*, one shopping center developer sued another under the Sherman Act claiming that defendant conspired with a department store to cause that store to locate in defendant's proposed development rather than plaintiff's. Thus, *real estate brokerage services were not even in issue.* Plaintiff contended that interstate commerce was affected because out-of-state goods would flow into the area as a result of the development. 408 F. Supp. at 122.

Shortly after plaintiff in *Sapp* submitted its pre-trial statement, defendant moved for summary judgment under F.R. Civ. P. 56. By moving under Rule 56, defendant challenged the *legal* sufficiency of plaintiff's case, and the trial court was therefore required to presume that plaintiff's factual allegations were true.[10]

10 As the district court said:

> The May motion for summary judgment upon the antitrust counts against it was prompted by that factual statement by the plaintiffs. Thus, May took the position that all facts stated by plaintiffs, if true, do not provide a basis for federal jurisdiction under the antitrust laws . . . . 408 F. Supp. at 121.

Notwithstanding this presumption, however, the district court dismissed the complaint even though serious legal and factual questions remained concerning the adequacy of plaintiff's interstate commerce allegations. It was this decision, procedurally and factually distinguishable from the instant case, which the Seventh Circuit reversed without a published opinion.

Unlike defendant in *Sapp*, respondents here contend, as the Fifth Circuit held, that under Rule 12(b)(1) jurisdictional facts alleged by petitioners must be proved. Under Rule 12(b)(1), petitioners are not afforded the presumption that their allegations are true, but instead have the burden of proving that jurisdiction is present. This they failed to do after extended discovery granted by the district court.

Indeed, once the distinction between Rule 12(b)(1), on one hand, and Rules 12(b)(6) and 56, on the other, is understood, it becomes clear that many of the district court cases which petitioners list (Pet. 15-16) as conflicting with this case in fact represent no conflict at all. Most involved attacks on the sufficiency of the complaint or motions to dismiss before plaintiff had an opportunity to prove his jurisdictional allegations.[11]

11 *See United States* v. *Jack Foley Realtors, Inc.*, 1977-2 Trade Cases ¶ 61,678 (D. Md. 1977) (allegations in indictment presumed true for purposes of motion to dismiss); *Gateway Assoc., Inc.* v. *Essex-Costello, Inc.*, 380 F. Supp. 1089 (N.D. Ill. 1974) and *United States* v. *Atlanta Real Estate Board*, 1972 Trade Cases ¶ 73,825 (N.D. Ga. 1971) (decisions rendered on pleadings); *Knowles* v. *Tuscaloosa Bd. of Realty Inc.*, No. 75-P-591 (N.D. Ala. 1975) and *Wiles* v. *Tampa Bd. of Realtors, Inc.*, No. 74-136 Cir. T-K (N.D. Fla.) (unreported orders denying pre-trial motions attacking pleadings). Each of these decisions turned on the specific facts pleaded in each complaint.

Petitioners' desperation in their search for a conflict among the lower courts is most vividly revealed by their reliance on *United States* v. *Long Island Bd. of Realtors*, 1972 Trade Cases ¶ 74,068 (E.D.N.Y. 1972). That case involved a consent decree containing nothing more than a pro forma recitation of the court's jurisdiction to enter judgment based on the settlement. It is axiomatic that antitrust consent decrees have no precedential value. *See* 15 U.S.C. §16(a).

When all of the cases decided on pleadings are eliminated from petitioners' list, only two remain. In *Oglesby & Barclift, Inc.* v. *Metro MLS, Inc.*, 1976-2 Trade Cases ¶ 61,064 (E.D. Va. 1976), a district court entered final judgment for plaintiff who was denied access to defendant's multiple listing service. It appears from the court's opinion that a jurisdictional challenge was never made. The other, *Mazur* v. *Behrens*, 1974 Trade Cases ¶ 75,070 (N.D. Ill. 1972), is simply a seven year old aberration. In *Mazur*, the district court mistakenly assumed that Sherman Act jurisdiction could attach from the mere fact that some clients of defendant real estate brokers were from out-of-state. This flatly contradicts *Yellow Cab's* holding that the use of local services by out-of-state consumers does not render those services subject to the Sherman Act.

Indeed, the Fifth Circuit itself draws the distinction between the use of local services by out-of-state consumers and the movement of out-of-state consumers for the express purpose of using the local services. In

Feminist Women's Health Center, Inc. v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978), the Fifth Circuit refused to dismiss a Sherman Act monopolization complaint by a low-cost abortion clinic against various local doctors. Plaintiffs asserted that interstate commerce was affected because, among other things, many out-of-state patients used plaintiffs' clinic. The Fifth Circuit found that those out-of-state patients were an integral part of the allegedly monopolized commerce because they crossed a state line for the *express purpose* of using the plaintiffs' abortion clinic. On this basis, the Fifth Circuit distinguished its decision in this case. Here, there is no evidence in the record that any of respondents' clients crossed state lines for the express purpose of purchasing New Orleans residential real estate.

As the Fifth Circuit said:

> The Court's recent decision in *McLain* v. *Real Estate Bd. of New Orleans* is not to the contrary . . . . [In that case, the] court applied the substantial effects test and held that Sherman Act jurisdiction is not conferred by the allegation "that many of the defendants' customers are 'persons moving into and out of the Greater New Orleans area.' " . . . . That conclusion is unassailable because few people cross state lines *for the purpose* of purchasing residential real estate. The effects of the conduct alleged in this case . . . is that persons cross the Florida-Georgia state line for the purpose of

coming to the Center's Tallahassee clinic. (emphasis in original) 1978-2 Trade Cases ¶ 62,382 at 76,277 n.3.

CONCLUSION

Petitioners' complaint was properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. Indeed, plaintiffs concede that the district court's dismissal and the Fifth Circuit's affirmance correctly follow, rather than conflict, with "conventional" Sherman Act interstate commerce analysis by this and other courts. For these reasons, the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify this ____ day of April, 1979 that I have served three copies of the foregoing Brief in Opposition upon Mr. Richard G. Vinet, 144 Elk Place, Suite 1202, New Orleans, Louisiana 70112, Attorney for Petitioners, by mailing same, postage prepaid, addressed to him at his office.

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